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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No......

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. MCGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON, Petitioners,

against

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK *

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari be issued to review the final judgment entered on the

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* Unless otherwise indicated, all page references refer to the Appendix annexed to this brief, and all folio references refer to the Record in the Court of Appeals.

amended remittitur of the Court of Appeals of the State of New York in the Office of the Clerk of the County of Queens on August 8, 1951 (pp. 53-59), which affirmed the judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in the office of the Clerk of the County of Queens on November 2, 1950, which had reversed a judgment of the Supreme Court of the State of New York, Queens County, entered in the office of the Clerk of the County of Queens on May 11, 1950 (p. 49), in favor of the petitioners and against the respondents, and dismissed the petitioners' complaint on the law.

Jurisdiction

The jurisdiction of this Court is invoked under Sections 1257 and 2101 of Title 28 of the United States Code Annotated (Judiciary and Judicial Procedure).

Questions Presented

The questions presented for review by this Court are:

(1) The Court of Appeals of the State of New York had held (*Clark* v. *Curtis,* 297 N. Y. 1014), prior to its determination in the instant case, that where a labor union, representing the majority of the employees in a plant, had entered into a collective bargaining agreement with the employer, the employees who were non-union members could bring suit in a state court against the union where it had, as a fiduciary agent, betrayed the interest of its principals, the non-union employees. In this case the Court of Appeals held that such employees no longer had that common law right.

Questions presented on this appeal are, therefore: Did the Taft-Hartley Act destroy the previously existing com-

mon law right of non-union employees as principals to sue in the State Court to restrain the betrayal of their interests by their faithless agent, the union?

(2) If the Court of Appeals was correct in its interpretation that the Taft-Hartley Act did deprive the petitioners of such common law right against their faithless agent, was such destruction of the common law rights of the petitioners unconstitutional?

(3) The respondent labor union representing the majority of the employees in the delivery department of the respondent employer's plant limited its membership to the sons of its own members. It then entered into a collective bargaining agreement under the provisions of the Taft-Hartley Act providing for a union shop, requiring all employees to be or become members of the Union within thirty days after the effective date of the agreement. At the end of the said thirty day period, the Union continued to refuse to admit to membership any of the petitioners (who were employed by the respondent-employer in its delivery department but were not members of the Union).

The Trial Court granted judgment directing the Union to admit the petitioners into membership or else to cease acting as a collective bargaining agent for all the employees. The Court of Appeals reversed that judgment.

The next questions presented on this appeal are, therefore:

May a union, under the Taft-Hartley Act, continue to act as a collective bargaining agent while limiting membership to its own sons and refusing to admit non-union employees into membership?

(4) If the Taft-Hartley Act does give the power to labor unions to limit its membership and thus keep the power of representation in the grasp of only some of the employees, is the Taft-Hartley Act unconstitutional in that respect?

Statute Involved

This appeal involves the interpretation and constitutionality of the Labor Management Relations Act, 1947 (29 U. S. C. A., Sec. 141, *et seq.*), known as the Taft-Hartley Act.

Statement of Facts

Respondent, News Syndicate Co., Inc. (hereinafter referred to as the "News") is the publisher of the New York Daily News and the New York Sunday News. Respondent Newspaper and Mail Deliverers' Union of New York and Vicinity (hereinafter referred to as the "Union") is a union whose membership includes the majority of the employees employed in the delivery department of all the large newspapers published in the City of New York.

The petitioners are all employed by the News in its delivery department. None of the petitioners are members of the Union, although all of them have applied for membership and been rejected.

The Union is what is known as a "closed union". Its books are and have been for many years closed to all new members except: (a) one legitimate male issue of a deceased member who had been in good standing for ten years; or (b) where a deceased member left no legitimate male issue, then, in that event, one legitimate male issue of a living member in good standing for more than twenty years could apply for the unclaimed card (Union's Constitution, Secs. 8 and 9, Pltffs'. Ex. 10, fols. 1715-1726, 1062-1064).

The foregoing restrictions have been strictly enforced. As a result, none of the petitioners have been able to join the Union though all of them have applied for membership and have at all times been ready and anxious to join (fols. 1205-1215).

On October 25, 1948, the News (through its agent, the Publishers Association of New York City) and the Union entered into a collective bargaining agreement (hereinafter referred to as the "Agreement") covering the employees in its delivery department (fol. 554).

In entering into the Agreement, the Union admittedly acted as the exclusive bargaining agent for all of the employees, including the petitioner, working in the delivery department of the News (fols. 171-172).

The Agreement of October 25, 1948 provided for what is known as a "union shop". Prior to the making of that agreement, the News plant was operated as a "closed shop".

The relevant portion of paragraph 2-L of the collective bargaining Agreement reads as follows (fols. 1642-1643):

> "The employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees * * * employed after the effective date of this agreement be required to become members of the Union thirty days following the beginning of employment." (The omitted portion relates only to so-called "half-day boys" and it was stipulated that none of the plaintiffs are in that category—fols. 1601-1602.)

Said Section 2-L also provided (fol. 1642):

> "The Union offers to furnish at all times and at regular time rates as many men as may be required by a Publisher, such men to be competent and able to perform the particular operation for which they are required."

The Proceedings in the State Courts

The petitioners commenced an action in the Supreme Court of the State of New York, County of Queens against the Union and the News to enjoin the enforcement of the Agreement on the grounds that it represented a violation of the fiduciary duty owed by the Union, as exclusive bar-

gaining agent, to the petitioners, its principals, and to compel the Union either to admit the petitioners into membership or to waive the Union shop provisions of the Agreement.

The case came on for trial before Mr. Justice Francis G. Hooley, sitting without a jury, at a Special Term, Part III of the Supreme Court of the State of New York, Queens County.

The Opinion of the Trial Justice Whose Findings of Fact Were Affirmed

Mr. Justice Hooley granted judgment in favor of the petitioners with an opinion fully considering the law and the facts. Mr. Justice Hooley's opinion is set out in full in the appendix of this petition (pp. 37-48).

All of the findings of fact set forth in Mr. Justice Hooley's opinion have been affirmed by the Appellate Courts and, therefore, for purposes of this appeal, are deemed established.

Judge Hooley found that, as a matter of law, the Union, as bargaining agent, owed the duty of representing non-union employees fairly.

The Trial Justice found that the Union did not fairly represent the petitioners in negotiating the Agreement and that it breached its obligation as bargaining agent for petitioners by providing that the employer would employ only members of the Union thirty days following the effective date of the contract, and by offering to furnish at all times as many men as might be required by the News, although the Union then, and at all times thereafter to the present time, has arbitrarily excluded the petitioners from membership in the Union.

The Court found that the complaint herein is not based upon any statute, but is based upon the common law principle that an agent is held to the highest good faith in his dealings with his principal, and if the agent acts adversely

to the principal in any part of the transaction he is guilty of fraud. Judge Hooley pointed out that a Union shop is not illegal, but that the illegality here arose from the fact that the agent Union entered into an Agreement providing for a Union shop while, at the same time, it arbitrarily excluded petitioners from membership.

Judge Hooley pointed out that the Union had a monopoly of the distribution of the great newspapers of the City of New York and had wholly forgotten the rights of the workers whom it was under an obligation to protect, and had arrogated to itself the right to interfere with the livelihood of the forty-five petitioners and their families in the interest of perpetuating a hereditary class of newspaper deliverers.

The Trial Justice specifically found that the actions of the Union herein which imposed limitations on the right of other men to follow the calling of newspaper delivery were repugnant to the common law, the labor statutes, and the Constitution of the United States.

The Trial Court also found that the attempt by the Union to maintain a Union shop in which many non-Union men are employed while at the same time insisting on a closed Union violates the Constitution of the United States in that it denies to the petitioners the equal protection of the law. He said the Union could not deny to the petitioners freedom of the right to contract in favor of other persons whose only claim to a preference is derived from the accident of birth.

The Trial Court also found that the contentions of the respondents that petitioners' remedy is within the exclusive jurisdiction of the National Labor Relations Board, could not be sustained.

The Court then discussed fully the relief sought by the petitioners seeking to compel the Union to admit the petitioners to membership. The Court first pointed out that the law in this state, for a long time, has been that a union cannot be compelled to admit strangers to membership,

but the Court also pointed out that none of the cases ever decided by the courts had the slightest resemblance to the case at bar.

The petitioners here, the Court said, were not strangers. They were principals for whom the Union acted as an agent.

Yet their agent executed an agreement limiting employment to members of the Union except where Union men were not available, and despite that limitation, their own agent (the Union) arbitrarily excluded the petitioners from membership. And the hiring practices followed after the Agreement gave preference and privileges to the Union men not enjoyed by the petitioners.

The Court stated the principle of law to be the following (pp. 47-48):

> "Where a union is designated as a bargaining agent on behalf of all of the employees and accepts the principle of the Union shop and incorporates such principle into a contract which provides that all non-union men must join the union within 30 days, then such provisions of the agreement relating to the union shop are illegal, invalid and void in a case such as this, where the union refuses to admit such non-union men to membership without just cause and discriminates against such employees because of such non-membership in the Union."

And the Court pointed out that it was no excuse to say that the action of the Union in denying membership to petitioners does not violate the Taft-Hartley Act. For the Court said—and this is very important—this action is not brought under the Taft-Hartley Act (p. 48).

And, upon all the circumstances of the case, the Court found that the Union, owing as it did, the high obligation of an agent to his principal, must take the petitioners into the Union or else refrain from conducting their activities and relations with the petitioners upon the basis of the principle of a union shop.

The Court therefore granted an injunction to the petitioners directing the Union to admit the petitioners to full membership, or, in the alternative, restraining the respondents from conducting their activities and relations with the petitioners upon the basis of the principle of a union shop.

The Reversal by the Appellate Division

The Appellate Division, in a *per curiam* opinion, unanimously reversed on the law the judgment in favor of the petitioners entered after trial (pp. 52-53).

Although the Appellate Division, in its opinion, held that the complaint was based on a common law cause of action for breach of obligation by an agent, nevertheless, the Appellate Division ruled that the controversy involves unfair labor practices within the provisions of the Labor Management Relations Act, 1947, and, therefore, exclusive jurisdiction thereof is vested in the National Labor Relations Board.

In reversing and dismissing the complaint on the law, the Appellate Division specifically affirmed the facts found by the Trial Justice below (p. 52).

The opinion of the Appellate Division is included in the Appendix (pp. 52-53).

Proceedings in the Court of Appeals

The petitioners herein appealed to the Court of Appeals in the State of New York.

The Court of Appeals affirmed, without opinion, the judgment of the Appellate Division reversing the judgment of the Supreme Court, Queens County.

Thereafter, the petitioners moved in the Court of Appeals to have that Court amend its remittitur so as to state

the grounds of its decision "in order to remove uncertainty and make it clear to the Supreme Court of the United States, upon application for a writ of certiorari, whether or not a federal question was necessarily decided" (Petitioners' Motion to Amend Remittitur, p. 17).

The Court of Appeals granted the motion to amend the remittitur, and added to the remittitur a statement clearly showing that its decision was based on its interpretation that the cause of action asserted herein was barred by the Labor Management Relations Act, 1947, so that a federal question is necessarily involved on this petition. The amended remittitur is annexed as part of the Appendix to this petition (pp. 53-54).

The Manner in Which the Federal Questions Sought To Be Reviewed Were Raised, and the Way in Which They Were Passed Upon by the Courts Below

The questions of interpretation of the Taft-Hartley Act and the constitutional questions herein were consistently raised in this action from its very inception.

In their amended complaint filed in the Supreme Court, Queens County, the petitioners contended that the actions of the respondents herein deprived them of their rights guaranteed under the Constitution of the United Sta'es (pp. 31-32). In its answer filed in that Court, the Union contended that under the Labor Management Relations Act, 1947, this action could not be maintained (p. 34). In their opening statements at the Trial Court, counsel for both defendants pointed out that the remedy of the petitioners was by application to the National Labor Relations Board and not to the State Courts (fols. 101-151).

In his opinion granting judgment to the petitioners, the Trial Justice ruled that the Taft-Hartley Act did not exclude the State Court from jurisdiction in this case. The Trial Justice also ruled:

> "The attempt of the defendant Union to impose limitations on the right of other men to follow the calling of newspaper deliverers is repugnant to the common law, the labor statutes, state and federal, and the Constitution of the United States" (p. 41).

The Trial Justice also found that the attempt by the Union to maintain a union shop in which non-union men are employed, while at the same time insisting on a closed union, is a paradox violating the Constitution of the United States, in that, it denies to the petitioners the equal protection of the laws (pp. 41-42).

On the appeal to the Appellate Division, respondent Union contended, as its Point I, that sole jurisdiction of this controversy lay with the National Labor Relations Board under the Taft-Hartley Act. The News, as its first Point in its brief on the appeal to the Appellate Division also contended that exclusive jurisdiction of this controversy under the Taft-Hartley Act was given to the National Labor Relations Board.

In their brief to the Appellate Division, petitioners contended, in their Point III, that denial of the relief requested herein would violate their rights under the Fifth Amendment to the Constitution of the United States. The petitioners, in their brief, also denied that th National Labor Relations Board was granted exclusive jurisdiction of this controversy under the Taft-Hartley Act.

The Appellate Division, in reversing the judgment of the Trial Court, ruled that exclusive jurisdiction of this controversy was granted to the National Labor Relations Board by the Labor Management Relations Act, 1947 (pp. 52-53).

In their brief submitted to the Court of Appeals, petitioners argued the Labor Management Relations Act, 1947 did not deprive the State Courts of their jurisdiction of this controversy, and continued further that if the Appellate Division correctly interpreted the Labor Management Relations Act, 1947, then that Act violated the Fifth Amend-

ment to the Constitution of the United States. The Court of Appeals made clear by their order granting the motion to amend the remittitur that their decision was based upon their interpretation of the Labor Management Relations Act, 1947 (p. 54).

Reasons for Granting the Writ

The questions involved in this petition concern basic interpretations of one of the most important statutes ever enacted by the Congress of the United States—the Labor Management Relations Act, 1947.

The Court of Appeals of the State of New York has interpreted the Act in such a way that it becomes a powerful weapon of oppression against the petitioners and against all persons similarly situated who are forced to be represented in negotiating for their livelihood by a union which systematically excludes them from membership while at the same time it continuously betrays their interests.

Questions presented on this appeal have never been passed on by this court. If the interpretation given to the Labor Management Relations Act, 1947, in this situation is proper, then this Court should pass upon the constitutionality of that Act as so interpreted. If the interpretation given to the Act by the Court of Appeals is improper, this Court should correct the interpretation for the guidance of the petitioners and for those similarly situated.

(1)

The first question involved in this proceeding is whether the Labor Management Relations Act, 1947, has deprived petioners of common law rights which they previously had, and, if so, whether the Act is unconsitutional in that respect.

The Court of Appeals has interpreted the Taft-Hartley Act so as to deprive petitioners of the common law right which they previously had to restrain a faithless agent from violating its obligations.

This action was brought on the common law principle of agency. The Union was by law an agent of all persons employed in the delivery department of the News, including the petitioners. As such agent it was required to represent the petitioners fairly; instead, the agent entered into an Agreement providing for a union shop while excluding the petitioners from membership solely because they were not sons of union members; and by so doing, the Union violated its common law obligation of fairly representing its principals. Under such circumstances, petitioners were entitled to the relief demanded in their complaint.

Prior to this action, the New York Court of Appeals had sustained a complaint, which was identical *mutatis mutandis* with the instant complaint. In that case, *Clark* v. *Curtis,* 297 N. Y. 1014, the plaintiffs there had sued the identical Union and their employer on the identical agreement which is here involved, except the *Clark* agreement provided for a closed shop while in the instant case the agreement provided for a union shop which, after the thirty day period, became for all intents and purposes a closed shop. In the instant case the complaint was dismissed solely because the Taft-Hartley Act had been enacted after the service of the complaint in *Clark* v. *Curtis, supra.*

The Trial Justice had sustained the complaint in this case on the authority of *Clark* v. *Curtis* (fols. 1912-1913). However, the Appellate Division in reversing pointed out that the case of *Clark* v. *Curtis, supra,* was instituted prior to the passage of the Labor Management Relations Act, 1947, and that the question of exclusive jurisdiction of the National Labor Relations Board under that Act was not raised nor could it have been raised in that case.

And, of course, the Court of Appeals, in its amended remittitur, definitely explained that its decision was based on its interpretation that the Labor Management Relations Act, 1947, deprived the State Courts of jurisdiction in this case.

It is clear that under the New York State law the petitioners would have been entitled to the relief sought had not the Court of Appeals found that the Labor Management Relations Act, 1947, had divested the state's court of jurisdiction. (See also *Wilson* v. *Hacker,* 101 N. Y. S. 2d 461, official citation not available).

The fallacy in the reasoning of the Court of Appeals lies in the fact that the Labor Management Relations Act, 1947, fails to vest in the National Labor Relations Board any authority to grant the full relief sought by the petitioners.

In other words, although the Court of Appeals has held that the Act has divested the state courts of the jurisdiction which it normally would exercise (cf. *Clark* v. *Curtis, supra*), the Act itself provides no remedy.

This court has held that where the administrative remedy is not adequate to provide the relief sought, there is no obligation on the part of petitioners to exhaust such administrative remedy before applying to the state courts for relief.

Thus, in *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192, this court rejected the argument that the plaintiffs involved there must pursue their administrative remedy under the Railway Labor Act (25 U. S. C. A. Sections 151 et seq.). Before seeking an injunction against a majority union which, while barring them from membership, betrayed their interests. In so ruling, the court stated (at p. 206):

> "There is no administrative means by which the Negro firemen can secure separate representation for the purposes of collective bargaining. For the Mediation Board 'has definitely ruled that a craft or class of employees may not be divided into two or more on the basis of race or color for the purpose of choosing representatives'."

It is the petitioners' contention that the Court of Appeals erred in its construction of the Labor Management Relations Act, 1947, since that Act afforded no remedy to the petitioners for the relief which it sought in the state courts. Where the administrative remedy is insufficient to afford adequate relief, the state courts are not divested of jurisdiction.

We submit that this Court should rule finally on whether the Labor Management Relations Act, 1947, has deprived the state courts of the jurisdiction which they previously had to restrain the breach of its obligations to its principals by the agent Union.

The Labor Management Relations Act, 1947, gave these petitioners no rights which they had not theretofore possessed. The Act did, however, take away from them a very important right—the right to bargain in their own behalf with their employer.

There is, of course, no question but that the requirement that the employer bargain collectively only with the representative of the majority is an abridgement of the minority's fundamental rights. It is for that reason that the Union, chosen by the majority, is made equally the representative of the minority.

However, the broad public purpose served by compelling the employer to bargain only with the representative of the majority does not mean that the bargaining agent has no obligations to the minority. In fact, it has been repeatedly stated by courts at every level that the Union owes the identical obligation to the minority which it owes to the majority.

If, then, the minority is to be deprived of its right to enforce against its agent (the Union) the obligation to deal fairly in their behalf, they have been deprived of their fundamental rights without any corresponding remedy to enforce the statute. Such a provision is clearly in derogation of the petitioners' common law and constitutional rights.

The statute should not be construed in such a way as to be in derogation of the rights of these plaintiffs without an express statement in the statute to that effect. Nowhere in the statute is there any provision that petitioners are to be deprived of their common law rights of enforcement against faithless agents.

The statute, moreover, fails to provide an adequate remedy by which the petitioners (non-union members) can protect themselves against a closed union which, by the principle of the union shop, perpetuates itself in existence, acts as a hostile representative to the non-union members whose interests it is supposed to protect, and is able, in hundreds of ways, unseen and unseeable, to do damage to these non-union employees who can never have an opportunity to be heard in its councils, nor to elect its officers and representatives. The petitioners are entitled to their common law right to protect themselves against those acts by their faithless agent.

If, in fact, this Court should find that the Labor Management Relations Act, 1947, deprives the petitioners of that common law right of action which they formerly had, then, it is respectfully submitted, the Act is, in that respect, unconstitutional.

The Taft-Hartley Act purports to protect against only one limited phase of the evil with which these petitioners are confronted; loss of their jobs because they are not union members. And even in that regard, the purported protection of the Taft-Hartley Act is very dubious.

For example, on February 28, 1951, the United States Court of Appeals for the Third Circuit (*National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 Fed. (2nd) 547), in an action against the very Union named as respondent here, held that the only discrimination which the Act prohibited was such discrimination as tended to encourage or discourage membership in a labor union.

However, the Court held, in the *Reliable* case, that no act of the employer could encourage membership in the re-

spondent union which strictly limited its membership to the sons of its own members. The non-union employees in the *Reliable* case were all anxious to join the respondent Union. None of them being fortunate enough to be eligible sons of members, could do so, however. And so the Court said, in finding for the employer there, that no action of the employer could encourage them to join this Union which they were already so anxious to join and could not do.

That is precisely the position of these petitioners, who also would like to join the respondent Union but cannot do so.

It is interesting to note that the Court, in the *Reliable* case, pointed out that the complainants there had failed to take any action in the State courts but instead had proceeded before the National Labor Relations Board in the first instance (187 Fed. (2nd) 551). And the Court also mentioned that where a non-union employee was threatened with discharge and replacement by a member of the same Union involved in this matter, the New Jersey Court of Chancery had issued an injunction restraining the Union from interfering with the non-member's employment (187 Fed. (2nd) 551, citing *Wilson* v. *Newspaper &c. Union,* 123 N. J. Eq. 347).

The ruling that the Labor Management Relations Act, 1947, has destroyed all of the petitioners' rights against their faithless agent, the Union, leaving them with only the limited remedy available to them before the National Labor Relations Board, constitutes a serious deprivation of their rights, and, if not erroneous, would make the Act unconstitutional.

There are many acts which can be committed by both an employer and a union which might constitute unfair labor practices and also constitute common law wrongs. Thus, a violent assault by union members on persons who are not members of the Union to prevent the latter from obtaining employment would be an unfair labor practice.

But it would also unquestionably be a common law wrong. Yet, under the interpretation laid down by the Court of Appeals, the Labor Management Relations Act, 1947, would bar the assaulted victims from seeking their common law remedy in the state courts. If, in fact, Congress intended the Labor Management Relations Act, 1947, to have that effect, then it is unconstitutional.

(2)

There is another question which should be reviewed by this Court which is of equal or more far-reaching importance. That is the question of whether a labor union which enters into a collective bargaining agreement as an agent of all the employees may bar certain of the employees from becoming members solely on the ground that they are not sons of the present Union members.

The Taft-Hartley Act does not forbid a union from limiting its members arbitrarily. Thus, in many cases, the National Labor Relations Board has declined to withdraw or refuse certification on the ground that the Union would not admit all the employees to membership. (*Norfolk Southern Bus Lines,* 83 N. L. R. B. 15; *Veneer Products,* 81 N. L. R. B. 492; *Texas and Pacific Motor Transport Co.,* 77 N. L. R. B. 15.)

The respondents in this case argued in all courts that the Taft-Hartley Act did not require the Union to admit the petitioners into membership, and that principle was accepted by the State courts.

The very fact that the Taft-Hartley Act does not permit the National Labor Relations Board to compel admission of fellow employees into the union which represents them is itself a most important reason for leaving jurisdiction in the State courts, since the plaintiffs cannot get adequate relief before the NLRB (*Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen,* 323 U. S. 210).

Exhaustive research has not disclosed any case in which this Court has ruled on the right of a union, acting as collective bargaining agent for all the employees, to exclude from membership arbitrarily certain employees whom it represents.

The right to obtain an order from the National Labor Relations Board against provable discriminations is a sorry protection to the employee who is willing and even anxious to join the Union but who is not permitted to do so. The only right which would really protect the worker is the right to join the Union which represents him and controls the bargaining process.

That right has never been passed upon by this Court.

In order to protect the principle of collective bargaining and to promote democratic practices in industrial relations, the Congress provided, first, in the National Labor Relations Act and then in the Labor Management Relations Act, 1947, that the group representing the majority of the employees of a particular unit, should be the exclusive bargaining agent for all of the employees in that unit.

The Union, designated by the majority, has now become, by law, the exclusive representative of all the employees in a particular unit, for the purpose of collective bargaining. There is an affirmative duty on the part of the employer to deal only with the Union. The employer is forbidden to deal with any other group of employees or any individual employee. The Union decides, by means of a collective bargaining contract, how much the excluded worker will be paid, when he will work, when he may have a vacation, when he may be laid off or discharged, the seniority he will enjoy, what he will receive as a pension when he retires, and what protection he has against accidents and illness.

Thus, from the cradle to the grave, the excluded worker's economic life and, as a result, to a great extent, his social and family life are ruled by the Union.

In all of those matters, discrimination against non-members is often carried out so deviously and subtly that no legal proof can be made.

Certainly, membership in the Union which represents him and controls his economic life is the least protection which an employee should be given against this agent to whom the law has given the sole right of bargaining which has been taken away from the individual employee.

Unjustified exclusion of any employee from the Union is a repudiation of the democratic, the representative function of the Union. By reason of the Labor Management Relations Act, 1947, it is only through the Union that the worker can exercise his bargaining power and his right to be heard. If the worker can have no share in deciding what his wages will be, when a strike is to be called, or how seniority will operate, then the Taft-Hartley Act has deprived him of his right to contract and given it to some agent to exercise in his behalf with no right on his part to share in the control of his agent's actions.

The evil is accentuated in this case because of the Union shop provision. The respondent Union, limiting its membership to the sons of its own members and having a monopoly of the newspaper delivery industry, can thus perpetuate its hereditary control.

This Court should review the determination of the Court of Appeals that the State Court no longer has jurisdiction to order a union either to admit non-union employees to membership or else to cease acting as a collective bargaining agent. (*James* v. *Marinship Corp.*, 25 Cal. (2nd) 721; *Clark* v. *Curtis,* 297 N. Y. 1014.)

If the Labor Management Relations Act, 1947 was correctly interpreted by the Court of Appeals, then the Act itself is unconstitutional in that regard.

It is petitioners' contention that they cannot constitutionally be compelled to be represented forever by a Union (by the very nature of the Union and its closed membership) in which they can never be members, for whose negotiators

they can never vote, in whose policies they have no voice, and upon the ratification of whose agreements they can never pass.

This Court has never expressed itself directly on that point. However, this Court did say in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 198, 202, that:

> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body * * *."

and again:

> "The representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its powers to deny, restrict, destroy or discriminate against the rights of those for whom it legislates * * *."

The so-called "white primary" cases are analogous. In *Smith* v. *Alwright*, 321 U. S. 649, this Court held that a resolution of the State Convention of the Democratic Party, a voluntary association, which excluded negroes from participation in primaries by excluding them from membership violated the Fifteenth Amendment.

In *Rice* v. *Elmore*, 165 F. (2d) 387 (4th Circ., 1947), cert. den., 33 U. S. 875, the Court considered the argument of the leaders of the Democratic Party in South Carolina, that a political party is a mere private aggregation of individuals who were free to bar from membership any applicants for any reason or no reason.

Judge Parker, speaking for the Court, rejected this argument in the following language:

> "The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of the years, political parties have become in effect state institutions, govern-

> mental agencies through which sovereign power is exercised by the people. Party primaries are of more recent growth. Originating in the closing years of the last century as a means of making parties more responsive to the popular will in the nomination of candidates for office, they had been adopted by 1917 in all except four of the states of the Union as a vital and integral part of the state election machinery" (165 F. 2d at 389).

Surely, the right of an individual to have some part in the negotiations which vitally affect his whole existence is as necessary under our economic system and as fundamental under our Constitution as the right of the individual to participate in the affairs of a political party.

By a Congressional Act—the Labor Management Relations Act, 1947—the majority employees were able to take from the petitioners the right to bargain with their own employer, and give that exclusive bargaining power to the Union. The Union, thus claiming its bargaining power under the Congressional Act, must exercise that power subject to the same constitutional limitations imposed upon the legislature. Certainly, the Congress could not constitutionally legislate that a political party which, by majority vote, has won an election, could thereafter bar non-members from joining the party.

If the Labor Management Relations Act, 1947, as interpreted by the New York State Court of Appeals, permits this Union to arbitrarily exclude from membership the employees whom it represents, then the Act itself is unconstitutional.

CONCLUSION

The issues involved in this proceeding are of far reaching importance to the petitioner; and to the public welfare. Those issues have never been passed upon directly by this Court.

This Court should review the question of whether the Labor Management Relations Act, 1947 has deprived petitioners of common law rights which they formerly had. If the Act does have that effect, this Court should rule on its constitutionality.

This Court should also determine the question of whether a union, under the Taft-Hartley Act, may exercise the power of collective bargaining and, at the same time arbitrarily exclude employees from membership. If a union may do so under the Taft-Hartley Act, the constitutionality of the Act itself should be reviewed by this Court.

For the foregoing reasons, it is respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

ARTHUR G. WARNER
and
JAMES E. BIRDSALL,
Attorneys for Petitioners.

Appendix A

Amended Complaint.

SUPREME COURT

OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. MCGUINNESS, LOUIS H. MEYERS, FRANK PARRELLA, ROCCO P. PARRELLA, ALFRED P. PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STACI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Plaintiffs,

against

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Defendants.

Plaintiffs, by Warner & Birdsall, their attorneys, complaining of the defendants, respectfully allege:

FIRST: That at all times hereinafter mentioned, the Newspaper and Mail Deliverers' Union of New York and

Vicinity, hereinafter called the Union, was and still is an association of more than seven members and is unaffiliated with any international of other union, and the abovenamed Joseph Simons is, at the time of the commencement of this action, the President thereof.

SECOND: That defendant Union at all times hereinafter mentioned was and now is a labor union, composed of newspaper and mail deliverers employed within the City of New York and vicinity.

THIRD: Upon information and belief, that defendant News Syndicate Co., Inc., hereinafter called the Corporation, is a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in the County of New York, State of New York.

FOURTH: That on and prior to October 25, 1948, and at all times hereinafter mentioned in this complaint, the defendant Union was the representative designated or selected for the purpose of collective bargaining by the majority of the employees of the defendant News Syndicate Co., Inc. and, as such, was the exclusive representative of all the employees of said defendant Corporation.

FIFTH: On October 25, 1948, the defendant Union, as such collective bargaining representative, and defendant Corporation entered into an agreement which, by its terms, was and still is effective and in full force and effect.

SIXTH: In and by said agreement, it was provided, in Section "2-L", in part, as follows:

> "The employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees other than half-day boys employed after the effective date of this agreement be required to become

members of the Union thirty days following the beginning of employment."

In and by said agreement it was provided, in Section "2-L", in part, as follows:

> "The Union offers to furnish at all times and at regular time rates as many men as may be required by a Publisher, such men to be competent and able to perform the particular operation for which they are required."

SEVENTH: The plaintiffs are all employed by the defendant Corporation as chauffeurs, distributors, route men, tiers, floor men, wrapper writers and relay men in the delivery and handling of newspapers, magazines, periodicals, publications and merchandise.

EIGHTH: Each of the plaintiffs has been employed in the aforesaid capacity by the aforesaid Corporation for the following periods of time, respectively:

Name	*Employed by defendant Corporation since:*
Thomas Ryan	September, 1946
Louis Aiges	December, 1947
Leon Altheim	February, 1947
Hyman Bassin	June, 1947
David Berger	December 26, 1947
Joseph W. Bianca	March, 1947
Edward F. Brennan	September, 1946
Salvatore Cirigliano	July, 1946
Carmelo Coscia	June, 1948
Abe Friedman	September 28, 1948
Emanuel Goldberg	January, 1948

Name	*Employed by defendant Corporation since:*
Louis S. Goldkranz	November, 1947
Abraham I. Gordon	October, 1948
Anthony Guerriero	March 8, 1948
Joseph Haugh	February, 1947
Walter Heller	October, 1948
Louis Hochberg	October, 1945
John T. Holcomb	March, 1948
John Jones	April, 1948
Peter A. Kelly	October, 1945
Daniel Kenny	March, 1947
William Kleinman	March, 1947
Neil Knowles	November, 1947
John R. McGuinness	September, 1946
Louis H. Meyers	January, 1948
Frank P. Parrella	February, 1946
Rocco N. Parrella	January, 1948
Alfred P. Petrassi	February, 1947
Benjamin Ricotta	January, 1947
Harvey Rose	January 30, 1948
Aaron Sacks	February, 1947
Henry Sadowitz	October, 1948
Michael Scudero	January, 1947
Jack Sender	September, 1945
Irwin L. Siegel	September, 1947
John W. Smith	October, 1945
Nicholas Staci	October, 1945
Arthur Sternberg	April, 1948

Name	*Corporation since: Employed by defendant*
David Stupnick	October, 1947
Manny Hirschbein	November, 1947
Anthony F. Chiccoli	December, 1948
Benjamin Gordon	September, 1948
Donald Mallozzi	March, 1947—June, 1948 February, 1949
Jack Miller	February, 1949
Carl J. Ericsson	October, 1948

NINTH: All of the plaintiffs are qualified to perform the duties which they are presently performing for defendant Corporation.

TENTH: More than thirty days have elapsed since the effective date of the aforesaid agreement between the defendant Union and defendant Corporation, but none of the plaintiffs are members of the defendant Union, and said Union has refused to admit any of the plaintiffs into membership, although all of the plaintiffs are now and have been since October 25, 1948, and prior thereto, ready and anxious to join such Union immediately, and ready and anxious to comply with all the prerequisites for becoming members of said Union.

ELEVENTH: Defendant Union is what is known as a closed union and will not admit any one to membership except the four following classes of persons: (a) one legitimate son of a deceased member; (b) one son of a member who has been in good standing for 20 years; (c) persons designated by the defendant Union to do organization work; and (d) certain persons who have been arbitrarily selected by the Executive Board and general membership of the Union to be admitted into the Union for the purpose

of creating the impression that the membership is open to persons other than sons of members; but, upon information and belief, not more than 1% of all the members taken in by the Union during the past five years are included in this last category.

TWELFTH: None of the plaintiffs comes within any of the categories listed in paragraph "8" above except plaintiffs Steinberg, Siegel, Rose and Kenny; Steinberg being a son of a deceased member, and Siegel, Rose and Kenny being sons of members for twenty years; but Steinberg and Rose have been rejected by the Union because they are not the oldest sons; Kenny has been rejected by the Union because his father's twenty years service was not continuous; Siegel has been rejected by the Union because of a question concerning his father's length of service.

THIRTEENTH: That plaintiffs cannot join and become members of the defendant Union for the reason that the books of defendant Union are closed and have been closed for more than 10 years last past except to the classes of persons set forth in paragraph "Eleventh" above.

FOURTEENTH: Although, under the laws of the State of New York and of the United States, defendant Union was the exclusive representative of all the employees of defendant Corporation, defendant Union did not fairly represent certain of the employees, including these plaintiffs, in negotiating and entering into the contract referred to in paragraph "Fifth" above.

FIFTEENTH: That the defendant Union breached its obligation as exclusive bargaining agent of all of the employees of defendant Corporation (including these plaintiffs) by providing in said agreement that the employer would employ only members of the Union 30 days following the effective date of the aforesaid agreement, and by

offering to furnish at all times, as many men as might be required by defendant Corporation, although defendant Union then and at all times to the present day has arbitrarily and unlawfully excluded plaintiffs and all other non-union employees of defendant Corporation from membership in said Union.

SIXTEENTH: That the conduct of the defendant Union, in violating its obligation to the plaintiffs in failing to represent them fairly in bargaining with defendant Corporation and in providing for a union shop while arbitrarily and unlawfully excluding the plaintiffs from membership in its Union, is contrary to the public policy of the State of New York.

SEVENTEENTH: That plaintiffs have at all times satisfactorily and properly performed their duties as employees of defendant Corporation, but defendant Union has threatened to cause the discharge of and defendant Corporation, has threatened to discharge the plaintiffs from their positions aforesaid on the sole ground that plaintiffs are not members of defendant Union.

EIGHTEENTH: That plaintiffs are entirely dependent for the support of themselves and their families on obtaining work in the positions which they now hold with defendant Corporation. Practically all of the jobs of the type described in paragraph "Seventh" are controlled by the defendant Union under contracts containing clauses similar to those contained in paragraph "Sixth" above, and, as a result thereof, the defendant Union has a monopoly on all of the jobs of that type in New York City and vicinity, the area in which all of the plaintiffs live and work.

NINETEENTH: By reason of the failure of defendant Union to bargain fairly on behalf of all the employees of defendant Corporation, and by reason of the arbitrary and

unlawful exclusion of plaintiffs from membership in defendant Union and by reason of the threat of defendant Union to cause the discharge of and of defendant Corporation to discharge the plaintiffs, the plaintiffs are threatened with irreparable damage, including the deprivation of their civil rights guaranteed to them under the laws and Constitution of the State of New York and the United States.

TWENTIETH: That plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs ask judgment herein: (1) temporarily and permanently enjoining and restraining the defendant Corporation from threatening to discharge and from discharging these plaintiffs upon the ground that they are not members of defendant Union or upon the ground that they are required to replace them with members of defendant Union or upon the ground that members of the Union have been employed by defendant Corporation so that no vacancies exist for these plaintiffs; (2) permanently and temporarily restraining the defendant Union from interfering with the employment of these plaintiffs by the defendant Corporation or from attempting to secure the dismissal of these plaintiffs by defendant Corporation or from sending some of its members to the defendant Corporation for the purpose of having them hired by defendant Corporation thus causing the defendant Corporation to discharge the plaintiffs, (3) ordering and directing the defendant Union either to (a) admit the plaintiffs to full membership of the Union upon their agreement to conform to the Union rules and regulations and to pay the required initiation fees and dues, or (b) waiving the aforesaid union shop agreement with defendant Corporation in favor of a union which would admit plaintiffs into full membership; and (4) granting to the plaintiffs such other further and different relief as to the Court may seem just and proper

in the premises, together with the costs, and disbursements of this action.

WARNER & BIRDSALL,
Attorneys for Plaintiffs,
Office & P. O. Address,
165 West 46th Street,
Borough of Manhattan,
City of New York 19.

(Verified by plaintiffs Hirschbein, Chiccoli, B. Gordon, Mallozzi, Miller and Ericsson on January 25, 1950.)

Appendix B

Answer of Respondent Union.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Defendant Newspaper and Mail Deliverers Union of New York and Vicinity, by Samuel Duker, its attorney, answering the complaint herein:

1. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs thereof numbered "Third", "Seventh", "Eighth", "Ninth", "Twelfth", "Eighteenth".

2. Denies each and every allegation contained in paragraphs thereof numbered "Eleventh", "Thirteenth", "Fourteenth", "Fifteenth", "Sixteenth", "Nineteenth" and "Twentieth".

3. Admits that more than thirty days have elapsed since the date of the agreement and admits that none of the

plaintiffs are members of the Union and except as so admitted, denies each and every allegation contained in paragraph "Tenth" thereof.

AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE, ALLEGES:

4. That at all times mentioned in the complaint the defendant News Syndicate Co., Inc. was and still is engaged in the publication of a newspaper known as the Daily and Sunday News which is circulated widely in the City and State of New York and in other states than New York and whose business is such as to make it a corporation operating in interstate commerce as that term is defined in the Labor Management Relations Act, 1947.

5. That, upon information and belief, the various acts complained of in the complaint herein constitute unfair labor practices on the part of the defendant herein, if committed as alleged, as such unfair labor practices are defined in said Labor Management Relations Act, 1947.

6. That, upon information and belief, sole and exclusive authority for the remedy of such unfair labor practices, as alleged, is by law vested in the National Labor Relations Board.

7. That by reason of the premises plaintiffs are not entitled to relief in this Court of Equity.

WHEREFORE, defendant demands judgment that the complaint herein be dismissed as against it, together with the costs and disbursements of this action.

SAMUEL DUKER,
Attorney for Newspaper and
Mail Deliverers Union,
120 West 42nd Street,
New York 18, N. Y.

(Corporation verification is on the back of the copy from which this copy was made.)

Appendix C

Answer of Respondent News.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

[SAME TITLE.]

Defendant, News Syndicate Co., Inc. by Townley, Updike & Carter, its attorneys, answering the complaint of plaintiffs herein,

1. Denies each and all of the allegations set forth in paragraphs Fourth, Seventh, Eighth, Sixteenth, Seventeenth, Nineteenth, and Twentieth of said complaint.

2. Denies each and all of the allegations set forth in paragraph Fifth of said complaint except the allegations that defendant Union and defendant corporation through its agent, Publishers' Association of New York City, entered into a collective bargaining agreement, effective October 25, 1948, which by its terms is still in full force and effect.

3. Denies each and all of the allegations set forth in paragraph Ninth of said complaint except the allegations that all of the plaintiffs at all the times mentioned in the complaint were qualified to perform the duties to which they have been assigned by defendant corporation on occasions when they were employed by said defendant.

4. Denies that it has knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs Tenth, Eleventh, Twelfth, Thirteenth, and Eighteenth of said complaint.

5. Denies that it has knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs Fourteenth and Fifteenth of said complaint except denies the allegations that defendant Union was the exclusive representative or bargaining agent of all the employees of defendant corporation.

WHEREFORE, defendant News Syndicate Co., Inc. demands judgment dismissing the complaint as to it, together with the costs and disbursements of this action.

TOWNLEY, UPDIKE & CARTER,
Attorneys for Defendant,
News Syndicate Co., Inc.,
Office & P. O. Address,
220 East 42nd Street,
Borough of Manhattan,
New York 17, N. Y.

(Verified by F. M. FLYNN, president, on February 6, 1950.)

Appendix D.

Opinion of Trial Justice.

SUPREME COURT,

QUEENS COUNTY,

SPECIAL TERM, PART III.

By HOOLEY, *J.* Dated: April 24, 1950

[SAME TITLE.]

APPEARANCES:

WARNER & BIRDSALL, Esqs., Attorneys for Plaintiffs, 165 West 46th Street, New York, New York, ARTHUR G. WARNER, Esq., JAMES E. BIRDSALL, Esq., of Counsel.

SAMUEL DUKER, Esq., Attorney for Defendant Newspaper and Mail Deliverers' Union, 11 West 42nd Street, New York, N. Y.

TOWNLEY, UPDIKE & CARTER, Esqs., Attorneys for Defendant News Syndicate Co. Inc., 220 East 42nd Street, New York, N. Y., J. HOWARD CARTER, Esq., JOHN S. BAINBRIDGE, Esq., of Counsel.

In this action some forty-five plaintiffs employed as chauffeurs, distributors and route men by the corporate defendant News Syndicate Co. Inc., hereinafter called the News, publisher of the Daily News and Sunday News, seek to restrain the said defendant News and the defendant Newspaper and Mail Deliverers Union, hereinafter called the Union, from threatening to discharge and from discharg-

ing plaintiffs or from interfering with the employment of the plaintiffs and ordering and directing the defendant Union either to (a) admit the plaintiffs to full membership in the Union, or (b) to waive the union shop agreement between the Union and the News in favor of a union which would admit plaintiffs into full membership. There was no proof of any actual discharge or even threat to discharge. There was considerable testimony offered, however, for the purpose of proving that the defendants interfered with the employment of plaintiffs illegally with resultant damage.

It appears that on and prior to October 25, 1948, the Union was the representative designated and selected for the purpose of collective bargaining by the majority of the employees of the defendant News in its delivery department, and as such was the exclusive representative of all of such employees of the defendant News.

On October 25, 1948, the defendant Union, as such collective bargaining agent, and the defendant News, together with other newspapers, entered into a written agreement, which provided in part as follows (Sec. 2L):

> "The employer agrees to employ only members of the Union thirty days following the effective date of this agreement, it being understood that any new employees other than half day boys employed after the effective date of this agreement be required to become members of the Union thirty days following the beginning of employment."

In and by said agreement it was further provided (Sec. 2L) as follows:

> "The Union offers to furnish at all times and at regular time rates as many men as may be required by a Publisher, such men to be competent and able to perform the particular operation for which they are required."

If insufficient union men were available the News had the right under the agreement to employ non-union men.

More than thirty days have elapsed since the effective date of the agreement aforesaid, but none of the plaintiffs have become members of the defendant Union although they desire to become such members and have made efforts to join the Union, but the Union on its part has refused to admit any of the plaintiffs into membership. The proof shows that the defendant Union will not admit anyone to membership except the four following classes of persons: (a) one legitimate son of a deceased member, (b) one son of a member who has been in good standing for 20 years, (c) persons designated in the defendant Union to do organization work, and (d) certain persons who have been arbitrarily selected by the executive board and general membership of the Union. The plaintiffs claim that the Union is a closed union and that the classification under (d) supra is merely a device for the purpose of creating the impression that the membership is open to other than sons of members.

The complaint in this action follows substantially the complaint in the case of *Clark et al.* v. *Curtis* (273 App. Div. 797, aff'd 297 N. Y. 1014). In that case the sufficiency of the complaint was sustained. Implicit in the decision aforesaid is the determination that as a matter of law a union acting as exclusive bargaining agent of all of the employees of a corporation is bound to represent all of such employees fairly, and that any arbitrary conduct or discrimination on its part which shall deprive any of the employees, who are willing to join the union, of any rights accorded to the members of the union, gives a right of action to those against whom the discrimination is practiced. If in the *Clark* case, *supra,* the union as bargaining agent owed no duty to the non-union employees to represent them fairly, then the complaint would have been dismissed.

The court finds that the defendant Union did not fairly represent certain of the employees, including the plaintiffs, in negotiating and entering into the aforesaid con-

tract with the defendant News, and that said defendant Union breached its obligation as exclusive bargaining agent of such employees of the defendant News by providing in said agreement that the employer would employ only members of the Union 30 days following the effective date of the contract, and by offering to furnish at all times as many men as might be required by defendant corporation, although defendant Union then and at all times thereafter to the present time has arbitrarily excluded plaintiffs and all other non-union employees from membership in said Union.

The complaint herein is not based upon any statute but rather is based upon the common law principle that an agent is held to the highest good faith in his dealings with his principals and that if such agent acts adversely to the principal in any part of the transaction, he is guilty of fraud (*Beatty* v. *Guggenheim Exploration Co.*, 223 N. Y. 294, 304; *Murray* v. *Beard*, 102 N. Y. 505, 508). What the defendant Union did in negotiating the contract with the defendant News was to provide for what is known as a union shop. Such a shop, of course, is not illegal. What is illegal here is that the agent Union entered into a contract providing that these plaintiffs, whom it represented in part, and to whom it owed good faith, must be discharged for failure to join the very Union which negotiated the contract and which would not accept these plaintiffs as members.

The selection of the defendant Union as bargaining agent for such of the employees of the defendant News was a selection imposed upon these plaintiffs by operation of law as a result of a majority vote in an election.

In *Wallace Corp.* v. *National Labor Relations Board*, 323 U. S. 248, an election was held to designate a bargaining representative between a C.I.O. union and an independent union. The independent union won a majority of the votes cast and was certified as the bargaining representative. The company then signed a closed shop agreement with the independent union which thereafter refused to admit to membership the C.I.O. employees. The latter were dis-

charged. The court reinstated with back pay the employees who had been discharged. The court said in part at page 255:

> "The duties of a bargaining agent selected under the terms of the Act extend beyond mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests, fairly and impartially."

To the same effect are the case of *Steele* v. *Louisville & Nashville R. R. Co.* (323 U. S. 192, 204; *Betts* v. *Easley,* 161 Kans. 459).

The protection granted by the common law and by the statutes, both state and federal, has been of inestimable value to the worker in enabling him to better his lot as to wages, hours of labor and working conditions. Under the beneficent protection of our laws, the unions have increased in strength and power and in the ability to protect the worker against unfair and sometimes selfish employers. But in the situation presented here, it is not a rapacious employer whose conduct is the subject of inquiry but a labor union which has a monopoly of the distribution of the great newspapers of the City of New York and which, wholly forgetful of the rights of the workers whom it is under obligation to protect, has arrogated to itself the right to interfere with the livelihood of forty-five employees and their families in the interests of perpetuating a hereditary class of newspaper deliverers under the principle of *primogeniture.* The attempt of the defendant Union to impose limitations on the right of other men to follow the calling of newspaper deliverers is repugnant to the common law, the labor statutes, state and federal, and the Constitution of the United States.

The attempt by the Union to maintain a union shop in which many non-union men are employed, at the same time

insisting on a closed union is a paradox. It is violative of the Constitutions both of the United States and the State of New York, in that it denies to the plaintiffs the equal protection of the law. The defendant Union seeks to deny to the plaintiffs freedom of the right to contract in favor of other persons whose only claim to a preference is derived from the accident of birth.

The attorney for the defendant Union calls the court's attention to the case of *Kelly* v. *Simons* (87 N. Y. S. 2d 767) which he contends sustains the position of the Union. In that case the Court said in part:

> "What would happen if the union should now attempt to interfere with the employment of the plaintiffs or do any acts tending to deny them any rights in connection with their employment enjoyed by union employees, is another matter. *Under the new union shop agreement the union could hardly insist upon non-union employees joining the union, and at the same time refuse them membership.*" (Italics supplied.)

That is precisely the case here. The Union did interfere with the employment of these plaintiffs and denied them rights which were enjoyed by the Union employees and the Union did require in the agreement which it negotiated in behalf of the plaintiffs that non-union persons such as these plaintiffs should join the Union, and yet at the same time refused to allow them to join the Union.

The action of the Union in refusing to allow the plaintiffs to become members thereof led to certain discriminatory practices by the defendants herein to the damage of plaintiffs.

Section 4 of the collective bargaining agreement between the defendants dealing with a seniority system, provided in substance that under Sec. 4-A the seniority of all employees was arranged on a shop seniority basis. First, all regular situation holders were given seniority and priority in accordance with their length of service with the News.

Next, all regular substitutes were listed according to the length of their service with the News. Next, so-called extras were listed in the order of their seniority and only after the lists of situation holders, substitutes and extras were exhausted, were any other classes of persons, including those employed in the delivery departments of other metropolitan newspapers, entitled to employment.

Section 4-B of the collective bargaining agreement provided that where a regular situation became vacant, it had to be filled, first, from among the regular situation holders, in accordance with their seniority standing, and then from among the substitutes, in accordance with their seniority standing. Section 4-G of the collective bargaining agreement defined a regular situation holder or regular substitute of the News as one receiving five days or five nights work in each calendar week for a period of five weeks. All of the plaintiffs came within this definition of regular substitute.

Prior to the commencement of this action, the hiring practice at the plants of the News in New York and Brooklyn was substantially as follows: At about 7 o'clock P. M. the substitutes reported for work. The names of the substitutes were then called, and they were assigned to the various positions which were open each night. The proof established that the names of the union men were called first, and thereafter the non-union men. Under this procedure, the names of union men were called ahead of non-union men with greater seniority. When the 7 o'clock positions were filled, the remaining substitutes would leave and report again at 12 o'clock, midnight. At that time the names of the substitutes were again called, and they were assigned to the positions remaining, but those whose names were not reached, did not work.

Under Sec. 4-B of the agreement, when openings existed among the regular situation holders, the vacancies were to be filled in the order of seniority. But in actual practice, the plaintiffs were passed over in favor of union members with less seniority.

On or about January 3, 1950 the Evening Sun, one of the great metropolitan papers, ceased to exist. Many of the union members employed by the Sun lost their positions and sought employment with the News. The effect of this on these plaintiffs became serious. Theretofore, the plaintiffs in the main had managed to average five nights work notwithstanding the preference granted to union members, which preference resulted in many of them having to attend seven nights per week to get five nights work, although union members were required to report only upon the nights they wished to work. But after January 3, 1950 the young sons of members, as before, continued to get preference by being admitted into the union, but now the former employees of the Sun who were union members received the same preference over the non-union men as is hereinbefore described. As a result there was a loss of work among the non-union employees, including these plaintiffs.

On January 16, 1950 this action was commenced. That night the News attempted to change the system by calling all men in their order of shop seniority, in accordance with Sec. 4-A of the bargaining agreement. The Union called a strike.

There was considerable argument upon the trial concerning industry seniority. But industry seniority is not permitted under the collective bargaining agreement. Sec. 4 thereof plainly states that employment shall be according to shop seniority. Sec. 4 gives a regular substitute a definite priority and seniority over extra men coming from other shops. It is true that the Adjustment Board made an interim award under date of May 23, 1949 to the effect that extra men should be hired on the basis of industry seniority. However, on June 30, 1947, said Adjustment Board handed down a final award which stated: "The following hiring practices shall be substituted for those temporarily in effect under the award of the Adjustment Board, dated May 23, 1949." A new schedule of hiring practices was set up under the final award which clearly superseded

that of May 23, 1949. The Union opposed the said final award and moved to vacate it. The Union claimed among other things that the contract provided a hiring preference for regular substitutes over extras; that such preference was set aside by the award and substitutes were hired from the same list as extras; that the contract provided for shop seniority; that the award set aside seniority and substituted therefor a complex system based on total earnings of each person in his own and in other shops with different point credits for the same amount of earnings in different years; that the contract gave regular situation holders and substitutes an unvarying seniority position on the basis of employment with one newspaper; that the award made the status of such person vary and change every three months in accordance with their earnings for three months prior in the newspaper publishing industry as a whole; that the contract gave extras seniority on the basis of their original employment with a newspaper; that the award set this aside and lists such persons on the basis of points earned throughout the industry.

Thereafter the Supreme Court vacated the award of June 30, 1947 (*Matter of Simons,* N. Y. L. J., November 4, 1949, Hecht, J.). The Court held in part:

> "* * * It seems clear to me that the arbitrators exceeded their powers in making the award of June 30. They were authorized to determine 'any question which may arise with respect to the qualifications or competency of employees or otherwise with respect to the interpretation or application of these provisions' governing seniority. Their award, however, rewrote the provisions of section 4 and devised a new method of hiring at variance therewith, * * *."

It is obvious that one of the methods of hiring condemned in the decision last cited was hiring on an industry wide basis rather than on the basis of shop seniority, as provided in the contract, which made the award illegal.

There is a dispute as to whether the interim award of May 23, 1947 survived the vacatur of the final award of June 30, 1947. Both defendants maintain such survival. It is clear to this court that when the award of June 30 came into existence, by its very terms it was substituted for the award of May 23, 1947, and that award went out of existence for all purposes and the vacating of the award of June 30, 1950 did not have the effect of reviving it.

In any event there is implicit in the decision of the court in the case last cited a determination that in no event could the Adjustment Board substitute industry seniority for shop seniority as specified in the plain language of the bargaining contract. It is immaterial whether the defendants did for a time substitute industry seniority for shop seniority after the interim and final awards aforesaid in the matter of hiring. Such action was clearly illegal being in conflict with the agreement.

This action does not involve a labor dispute within the meaning of Section 876-a of the Civil Practice Act. This contention was raised in all courts in *Clark* v. *Curtis, supra.* There is no dispute here as to wages, hours, working conditions or representation for collective bargaining (*Larose* v. *Possehl,* 156 Misc. 476). The controversy here involved relates to an alleged breach of trust, an alleged betrayal by the defendant Union of certain of the workers whose interests it was charged with protecting.

The contention of the defendants that if the plaintiffs have any remedy at all, it falls within the exclusive jurisdiction of the National Labor Relations Act, cannot be sustained. The case of *Clark* v. *Curtis, supra* is sufficient answer to that contention. The defendant Union urged upon the Court of Appeals in its brief in that case the effect of the Taft-Hartley Act (see also *Costaro* v. *Simons,* N. Y. Law Journal, Dec. 5, 1949, Supreme Court, Queens County, Colden, J.).

The plaintiffs are entitled to the injunctive relief sought, restraining the defendants, the News and the Union, from continuing the hiring practices heretofore followed and

herein condemned, restraining the defendant Union from interfering with the plaintiffs' employment. The plaintiffs are also entitled to judgment restraining the defendants from preventing the plaintiffs from enjoying the benefits to which they are entitled and from obtaining their rightful places in the shop seniority lists without regard to Union membership. The plaintiffs are also entitled to judgment restraining the defendants from giving preference to members of the Union, without regard to the principle of shop seniority and thus practicing discrimination.

With regard to the relief sought by plaintiffs seeking to compel the Union to admit these plaintiffs to membership therein, the court comes to a more difficult situation. It has been the law in this state for many years that a union cannot be compelled to admit strangers to membership (*McKane* v. *Adams,* 123 N. Y. 609; *Murphy* v. *Higgins,* 12 N. Y. S. 2d 913, aff'd 260 App. Div. 854; *Miller* v. *Ruehl,* 166 Misc. 479; *Acierno* v. *North Shore Bus Co. Inc.,* 173 Misc. 79, 81; *Shein* v. *Rose,* 12 N. Y. S. 2d 87). However, no case in which this principle of law was laid down bore the slightest resemblance to the case at bar.

At the risk of boring repetition, we must recall that here the Union acted as agent for the plaintiffs who were not members. As such agent, the Union provided in the bargaining agreement for a Union shop. The employer in said agreement was required to limit employment only to members of the Union, except where union men were not available. The hiring practices which were followed after the agreement gave preferences and privileges to the Union men not enjoyed by these plaintiffs.

This court conceives the following to be a principle of law:

> Where a union is designated as a bargaining agent on behalf of all the employees and accepts the principle of the Union shop and incorporates such principle into a contract which provides that all non-union men must join the union within 30 days, then such provisions of

the agreement relating to the union shop are illegal, invalid and void in a case such as this, where the union refuses to admit such non-union men to membership without just cause and discriminates against such employees because of such non-membership in the Union.

It is no answer to say that the action of the Union in denying membership to plaintiffs does not violate the Taft-Hartley Act. This action is not brought under that Act. There is present here a situation which has never been heretofore passed upon by the courts. It may be pointed out that these plaintiffs are not "strangers" to the union, that being the designation used in various decisions holding that the Union was not required to admit them. These plaintiffs are a part of the principals for whom the Union acts as agent and to whom the Union owes the duty of fair and honest dealing and against whom it may not discriminate in favor of the other principals who are members of the Union.

The plaintiffs are also entitled to judgment ordering and directing the defendant Union to admit the plaintiffs to full membership in the Union, except for just and legal cause, upon their agreement to conform to the Union rules and regulations and to pay the required initiation fees and dues, or in the alternative, restraining the defendants from conducting their activities and relations with these plaintiffs upon the basis of the principle of a union shop.

Settle judgment on notice.

(Signed) FRANCIS G. HOOLEY,
J. S. C.

Appendix E

Judgment of the Trial Court.

At a Special Term, Part III, of the Supreme Court, held in and for the County of Queens, at the County Courthouse, 88-11 Sutphin Blvd., Jamaica, New York, on the 10th day of May, 1950.

Present: Hon. Francis G. Hooley, *Justice.*

[Same Title.]

This action having duly come on for trial before Mr. Justice Francis G. Hooley, at a Special Term, Part III, of this Court, held in and for the County of Queens, at the County Courthouse, 88-11 Sutphin Blvd., Jamaica, New York, on the 6th day of March, 1950, and the issues having been tried before the Court without a jury on the 6th, 7th, 8th and 9th days of March, 1950, and the plaintiffs having appeared by Warner & Birdsall, Esqs. (Arthur G. Warner, Esq. and James E. Birdsall, Esq., of counsel), attorneys for the plaintiffs, and the defendant Joseph Simons, as President of Newspaper and Mail Deliverers' Union of New York and Vicinity, an unincorporated association consisting of more than seven members (hereinafter referred to as the "Union"), appearing by Samuel Duker, Esq., his attorney, and defendant News Syndicate Co., Inc. (hereinafter referred to as the "News"), appearing by Townley, Updike & Carter, Esqs. (J. Howard Carter, Esq. and John S. Bainbridge, Esq., of counsel), its attorneys, and all parties having presented their proofs and testimony having been duly heard by the Court; and none of the parties having submitted any requests nor having asked for an opportunity to submit any requests to find facts which such parties deemed established by the evidence; and due deliberation having been had; and the Court having duly

rendered and filed its decision in writing directing that judgment be settled in accordance with the aforesaid decision;

Now, on motion of Warner & Birdsall, attorneys for the plaintiffs, it is

ORDERED, ADJUDGED AND DECREED, that the plaintiffs have judgment against the defendants in the manner and to the extent hereinbelow more fully set forth; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant Union be and it hereby is permanently enjoined and restrained from interfering with the plaintiffs' employment by the defendant News by reason of plaintiffs' non-membership in the defendant Union; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant News and defendant Union be and they hereby are permanently enjoined and restrained from preventing the plaintiffs from enjoying the benefits to which they are entitled under the Agreement between the defendants, effective October 25, 1948 (hereinafter referrred to as the said Agreement), and from obtaining their rightful places in the shop seniority lists without regard to membership in the defendant Union; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant News and the defendant Union be and they hereby are enjoined and restrained from giving preference over these plaintiffs to members of the defendant Union, without regard to the principle of shop seniority, during the effective period of said Agreement and any subsequent agreement between the defendants which shall provide for shop seniority; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant News and defendant Union be and they hereby are permanently en-

joined and restrained from practicing any discrimination against the plaintiffs because of their nonmembership in the defendant Union; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant Union be and it hereby is directed to admit the plaintiffs to full membership in the defendant Union, except for just and legal cause, upon the plaintiffs' agreement to conform to the rules and regulations of the defendant Union and to pay the required initiation fees and dues to the defendant Union, or, in the alternative, the defendant Union and the defendant News be and they hereby are permanently enjoined and restrained from conducting their activities and relations with these plaintiffs upon the basis of a union shop; and it is further

ORDERED, ADJUDGED AND DECREED, that the execution of this judgment shall be stayed for a period of 30 days from the date hereof.

Enter,

FRANCIS G. HOOLEY,
J. S. C.

Appendix F

Opinion of Appellate Division.

SUPREME COURT

APPELLATE DIVISION—SECOND DEPARTMENT.

By Nolan, P.J.; Carswell, Adel, Sneed and Wenzel, JJ.

Ryan et al., res, v. Simons, &c., ap—In an action to restrain a labor union and an employer from discriminating against plaintiff employees because of their non-membership in the union and to direct defendant union either to admit plaintiffs to membership therein or to waive a union shop agreement with defendant employer, defendants appeal from a judgment in favor of the plaintiffs, entered after trial. Judgment reversed on the law, with costs, and the complaint dismissed on the law, with costs. The findings of fact are affirmed. Plaintiffs, employees of defendant News Syndicate Co., Inc., are not members of defendant union, and have been refused admission thereto, despite their conceded willingness to join and pay the required initiation fee and the customary dues. The union is a closed union and, in effect, admits only sons of members meeting certain requirements, within which class plaintiffs are not included. The theory of the complaint is that under such circumstances defendant union, the statutory exclusive bargaining representative of all the employees of the defendant employer, breached the common-law duty of agent to principal by entering into a contract with the employer providing for a union shop. It is clear, however, from the complaint, the prayer for relief and the testimony at the trial, that plaintiffs' basic grievance arises from discrimination against them, actual and threatened, in favor of union members. In our opinion, the controversy involves unfair labor practices within the purview of the Labor Management Rela-

tions Act, 1947 (U. S. Code, tit. 29, secs. 158 [a] [3] and 158 [b] [2]) and exclusive jurisdiction thereof is vested in the National Labor Relations Board (cf. Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d, 183; California Ass'n v. Building and Const. Tr. Council, 178 F., 2d, 175; U. S. Code tit. 29, sec. 160 [a]). The case of Clark v. Curtis (273 App. Div., 797, aff'd 297 N. Y., 1014) does not require a contrary holding. That case concerned the sufficiency of the complaint and was instituted prior to the passage of the Labor Management Relations Act, 1947. Unlike the case at bar, there was no showing that the employer was engaged in interstate commerce, and it does not appear that the question of the exclusive jurisdiction of the National Labor Relations Board, under the cited statute, was raised or could have been raised therein.

Appendix G

Amended Remittitur of Court of Appeals.

STATE OF NEW YORK,

IN COURT OF APPEALS.

AT a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany, on the twenty-fourth day of May A. D. 1951.

Present: HON. JOHN T. LOUGHRAN,
Chief Judge, Presiding.

[SAME TITLE.]

A motion for a reargument of or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein, and

papers having been duly submitted thereon, and due deliberation thereupon had, it is

ORDERED, that the said motion for reargument be and the same is hereby denied. The remittitur is amended by adding thereto the following:

"Upon this appeal this Court held that, since there was no question as to the interstate nature of the defendant employer's activities and since plaintiffs' basic grievance arises from discrimination against them, actual and threatened, in favor of union members, the controversy involves unfair labor practices by a labor organization within the purview of the Labor Management Relations Act of 1947; that plaintiffs were required, in the first instance, to avail themselves of the administrative remedy set up by the statute and seek redress before the National Labor Relations Board; and that, accordingly, the courts of this state have no jurisdiction of the present controversy."

AND, the Supreme Court of the County of Queens is hereby requested to direct its clerk to return said remittitur to this court for amendment accordingly.

A copy

GEARON KIMBALL,
Deputy Clerk.

Appendix H

Final Judgment of Court of Appeals and Notice of Entry.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that a judgment of which the within is a copy was this day duly entered and filed in the office of the Clerk of the County of Queens.

Dated, N. Y., August 8, 1951.

Yours, etc.,

TOWNLEY, UPDIKE & CARTER,
Attorneys for Defendant
News Syndicate Co., Inc.,
220 East 42nd Street,
Borough of Manhattan,
New York 17, N. Y.

To:

WARNER & BIRDSALL, ESQS.,
165 West 46th Street,
New York 19, N. Y.,
Attorneys for Plaintiffs.

SAMUEL DUKER, Esq.,
11 West 42nd Street,
New York 18, N. Y.,
Attorney for Defendant Simons.

Judgment.

SUPREME COURT
OF THE STATE OF NEW YORK,

COUNTY OF QUEENS.

[SAME TITLE.]

Plaintiffs having appealed to the Court of Appeals of the State of New York from the judgment of this Court entered in this action on the 2nd day of November, 1950 in the Office of the Clerk of the County of Queens, upon an order of the Appellate Division, Second Department, dated October 18, 1950, reversing a judgment in favor of the plaintiffs heretofore entered in this Court on the 12th day of May, 1950, and from each and every part of said judgment and order of reversal, as well as from the whole thereof; and said appeal having been duly argued at said Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudgd that said judgment so appealed from as aforesaid be affirmed and the complaint dismissed with costs, and having further ordered and adjudged that the proceedings herein be remitted to this Supreme Court, there to be proceeded upon according to law; and the remittitur from said Court of Appeals having been filed herein; and plaintiffs having moved in said Court of Appeals for a reargument, or in the alternative, to amend the remittitur and said motion for reargument having been denied and the remittitur amended by an order of the Court of Appeals dated May 24, 1951 and said remittitur having been refiled herein as amended; and an order dated July 31, 1951 having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now, on motion of Townley, Updike & Carter, Esqs., attorneys for defendant News Syndicate Co., Inc., it is hereby

ADJUDGED, that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

ADJUDGED, that the said judgment entered herein on the 2nd day of November, 1950, be and the same hereby is in all things affirmed on the law; and it is further

ADJUDGED, that defendant Joseph Simons, as President of Newspaper and Mail Deliverers' Union of New York and Vicinity, recover of plaintiffs, jointly and severally, the sum of $162.02, costs as taxed and that he have execution therefor against said plaintiffs or any one of them; and that the defendant News Syndicate Co., Inc., recover of plaintiffs, jointly and severally, the sum of $210.04, costs as taxed and that it have execution therefor against plaintiffs or any one of them.

The address of defendant Joseph Simons, as President of Newspaper and Mail Deliverers' Union of New York and Vicinity, is 63 Park Row, New York, New York and the address of defendant News Syndicate Co., Inc., is 220 East 42nd Street, Borough of Manhattan, New York 17, New York.

The addresses of said plaintiffs are as follows:

Thomas Ryan	140 West 238th St., N. Y., N. Y.
Louis Aiges	931 Troy Ave., Brooklyn, N. Y.
Leon Altheim	969 East 94th St., Bklyn., N. Y.
Hyman Bassin	2419 E. 27th St., Bklyn., N. Y.
David Berger	1861 50th St., Bklyn., N. Y.
Joseph W. Bianca	140 Wash. Walk., Bklyn, N. Y.
Edward F. Brennan	89-28 69th Rd., Forest Hills, L. I.
Salvatore Cirigliano	648 East 233rd St., Bronx, N. Y.

Carmelo Coscia	2267 1st Ave., New York, N. Y.
Abe Friedman	1925 Crotona Ave., Bronx, N. Y.
Emanuel Goldberg	716 East 5th St., New York, N. Y.
Louis S. Goldkranz	490 Kosciusko St., Bklyn., N. Y.
Abraham I. Gordon	5120 19th Street, Bklyn., N. Y.
Anthony Guerriero	17 Sterling Pl., Bklyn., N. Y.
Joseph Haugh	6807 7th Avenue, Bklyn., N. Y.
Walter Heller	708 West 177th St., New York, N. Y.
Louis Hochberg	100 Penn Street, Bklyn., N. Y.
John T. Holcomb	1552 E. 37th St., Bklyn, N. Y.
John Jones	450 West 51st St., New York, N. Y.
Peter A. Kelly	926 President St., Bklyn., N. Y.
Daniel Kenny	145 Seth Boyden Ter., Newark, N. J.
William Kleinman	299 E. Mt. Eden Ave., Bronx, N. Y.
Neil Knowles	111 East 3rd St., Bklyn., N. Y.
John R. McGuinness	2744 Fenton Avenue, Bronx, N. Y.
Louis H. Meyers	1091 Willmohr St., Bklyn., N. Y.
Frank P. Parella	460 East 181st St., Bronx, N. Y.
Rocco N. Parella	1177 73rd St., Bklyn., N. Y.
Alfred P. Petrassi	304 Adelphi St., Bklyn., N. Y.
Benjamin Ricotta	2021 West 10th St., Bklyn., N. Y.
Harvey Rose	2511 Newkirk Ave., Bklyn., N. Y.
Aaron Sacks	25-12 Steinway St., L. I. City, N. Y.
Henry Sadowitz	1016 East 13th St., Bklyn., N. Y.
Michael Scudero	4903 Avenue L, Bklyn., N. Y.
Jack Sender	1311 Seneca Avenue, Bronx, N. Y.
Irwin L. Siegel	2405 Avenue U, Bklyn., N. Y.
John W. Smith	720 52nd Street, Bklyn., N. Y.
Nicholas Stasi	102-28 88th Ave., Rich. Hill, L. I.

Arthur Sternberg	2263 84th St., Brooklyn, N. Y.
David Stupnick	488 Greenwood Ave., Trenton, N. J.
Manny Hirschbein	629 Avenue M, Brooklyn, N. Y.
Anthony F. Chiccoli	1967 West 4th St., Bklyn., N. Y.
Benjamin Gordon	274 East 175th St., Bronx, N. Y.
Donald Mallozzi	226 54th St., Bklyn, N. Y.
Jack Miller	788 Howard Avenue, Bklyn, N. Y.
Carl J. Ericsson	353 West 44th St., New York, N. Y.

PAUL LIVOTI,

Clerk.

NOV 26
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 386

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. McGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Petitioners,

—against—

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Respondents.

BRIEF OF RESPONDENT NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY.

SAMUEL DUKER,
Attorney for Respondent Union,
11 West 42nd Street,
New York, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 386

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. MCGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Petitioners,

—against—

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Respondents.

BRIEF OF RESPONDENT NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY.

Statement.

Respondent Newspaper and Mail Deliverers' Union of New York and Vicinity submits this brief in opposition to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

POINT I.

No federal question is involved on this appeal which merits review.

Petitioners' argument is reducible to the following elements:

A. In the court of first instance petitioners sued to enforce a common law right to fair representation by their collective bargaining agent.

1. Such a right of fair representation is well recognized by the Courts.

B. The appellate Courts in reversing the trial Court in effect abolished this common law right by holding that petitioners must seek redress under the Labor Management Relations Act, 1947.

1. Such a ruling is unconstitutional since the statute in question affords no remedy to petitioners.

C. A labor union which is the collective bargaining agent of all of its employees should not be permitted to bar some employees from membership.

Examination of the record and relevant law shows the petitioners' contentions untenable.

I.

Petitioners did not sue to enforce a common law obligation of a collective bargaining agent. The entire complaint is founded on an alleged violation of a statutory duty, imposed either by the New York State Labor Relations Act (N. Y. Labor Law, Secs. 705

et seq.) or the Labor Management Relations Act, 1947 (61 Stat. 136).

Paragraph "Fourth" alleges that the respondent Union "was the representative designated or selected for the purpose of collective bargaining by the majority of the employees . . . and, as such, was the exclusive representative of all the employees. . . ." This refers to a purely statutory concept.

". . . the defendant Union, as such collective bargaining representative" then entered into an agreement with the employer (Paragraph "Fifth")—again statutory language.

"Although, under the laws of the State of New York and of the United States, defendant Union was the exclusive representative of all the employees of defendant Corporation, defendant Union did not fairly represent certain of its employees, including these plaintiffs, in negotiating and entering into the contract referred to in paragraph 'Fifth' above" (Paragraph "Fourteenth").

"Fifteenth: That the defendant Union breached its obligation as exclusive collective bargaining agent of all of the employees of defendant Corporation (including these plaintiffs) by providing in said agreement that the employer would employ only members of the Union 30 days following the effective date of the aforesaid agreement, and by offering to furnish at all times, as many men as might be required by defendant Corporation, although defendant Union then and at all times to the present day has arbitrarily and unlawfully excluded plaintiffs . . . from membership in said Union."

"Nineteenth: By reason of the failure of defendant Union to bargain fairly on behalf of all the employees of defendant Corporation, and by reason of the arbitrary and unlawful exclusion of plaintiffs from membership in defendant Union and by reason of the threat of defendant Union to cause the discharge of . . . the plaintiffs, the plaintiffs are threatened with irreparable damage, including the deprivation of their civil rights guaranteed to them under the laws and Constitution of the State of New York and the United States."

One must conclude from the complaint that a violation of a statute—in contrast to a common law right—is involved. True enough, the pleading is somewhat coy about identifying the statute and uncertain as to whether it is a state or federal statute which is violated. But clearly, the pleading shows that some statute is being violated.

Petitioners' vagueness in the pleading may have been motivated by a consciousness that to name the statute violated would consign them to the statutory remedy. In any event, the appellate Courts did not share this reluctance to name the statute and to draw the necessary conclusion that the remedy as well as the wrong were statutory.

II.

Assuming, *arguendo*, that the pleading was founded on a breach of a common law obligation, then what is the obligation violated?

Petitioners, in the Court of Appeals, argued that it is a breach of a common law fiduciary obligation of

an agent to his principal. They there cited cases which hold the obligation of an agent to his principal to be one of a fiduciary character. In their present argument they do not as precisely define the obligation of the collective bargaining representative, but the entire notion, which they deem embodied by *Clark* v. *Curtis,* 297 N. Y. 1014, is one of a common law obligation.

The state and federal labor relations acts both speak of a union as a representative for purposes of collective bargaining. The use of the term "agent" is non-statutory, but frequent. Seizing on the word "agent" in the phrase "collective bargaining agent" they seek to clothe this term with all the attributes of common law agency. But a collective bargaining agent is no more a common law agent than a catalytic agent is one. The law is clear that a collective bargaining agent is a statutory concept and creature.

The issue was clearly posed in the case of *National Maritime Union* v. *Herzog,* 78 Fed. Supp. 146 (1948), affd. 68 S. Ct. 1529, 334 U. S. 854, wherein the Union complained of a deprivation of its right to be chosen as collective bargaining agent by reason of its failure to comply with the filing provisions of the National Labor Relations Act, as amended. Said the Court at page 155:

> "Quite apart from any statutory provision, employees have always had the right to organize trade unions, and through them to bargain collectively with employers concerning wages, hours, working conditions or any other appropriate subject. It is further true that a single employee has always had the right to bargain with his employer. . . .
>
> • • • •

". . . It (Congress) added to the fundamental right of employees to organize and to bargain with their employers, certain important privileges and benefits which had not existed heretofore. Not only was the right to organize unions and to bargain through them affirmed; but also the privilege of becoming the exclusive bargaining agent of all employees in a bargaining unit was extended to a labor organization favored by a majority of such employees. Moreover, employers were required to bargain collectively with the representative chosen by the majority vote. This, to be sure, was an abridgment of the minority's fundamental rights, as well as those of employers. But the importance of the broad public purpose sought to be served justified the means employed.

"Important in the consideration of the present case is the fact that, apart from the National Labor Relations Act, no union has the right to be exclusive bargaining agent. That extraordinary privilege is extended by statute and except for the Act, employers are not under compulsion to bargain collectively."

That the exclusive bargaining agent owes obligations to the workers in the collective bargaining unit was made clear by the Courts even under the Wagner Act prior to its amendment. Thus in *Wallace Corporation* v. *National Labor Relations Board,* 323 U. S. 248, this Court made it clear that the exclusive collective bargaining agent was "charged with the responsibility of representing their interests, fairly and impartially". This means that all men should have equal working rights within reasonable limitations such as seniority, etc. In other words, the members

of the Union should have no greater rights than non-members of equal skill or experience. It does not mean that every person in the bargaining unit must be pleased with everything the Union does.

Furthermore, analysis of this "common law agent" theory shows its untenability on other grounds. Since a union is the collective bargaining agent even of such persons as may have voted against it in an election, how did these minority workers make the Union their "common law agent"? Not by any of the known methods of creating the agency relationship.

As a matter of fact, the entire theory of agency is contrary to this view. Quite properly, long before the passing of our present-day labor acts, Mechem, in his work on Agency, ruled out such relationships from consideration in his treatise. Said he:

> "Authority created by law, independently of the act of the parties, in the few cases in which that may exist, is not a matter here to be considered. As has been already suggested, there are a few cases in which authority, or, more properly speaking, power, is conferred by law in certain cases. Thus an unpaid vendor of goods has a power of sale of the goods under certain circumstances. A pledgee has a power of sale. . . . A married woman, whose husband does not supply her, has, as has been already seen, a limited power to buy necessaries upon her husband's credit, which prevails notwithstanding his dissent. . . . None of these cases . . . is a question of agency at all. . . ."

1 Mechem: The Law of Agency, §203.

Applying petitioners' view of the concept that the Union owed all of the workers a common law agent's duty of highest fidelity to the industrial situation, we can arrive at some very interesting results. Should not the most recent of workers in the industry say that the Union breached its common law duty to them by making employment opportunities dependent on seniority? Should not extras object to the employment priority of substitutes and regular situation holders? Should not a worker who thinks he is worth more than than the wage scale set forth in the contract, have a cause of action against the Union for agreeing to a too modest wage scale?

The answer to these questions is obvious. A collective bargaining agent is not a common law agent of all of the employees in the unit. It can make good contracts and it can make bad contracts. With respect to non-members of the Union it owes but one obligation—to give them equal benefits under the contract with Union members. And if the workers in a bargaining unit do not like their collective bargaining agent they may seek to oust it by decertification under the Act.

Finally, it must be observed that the case of *Clark* v. *Curtis*, *supra*, never established this claimed common law right of fair representation. Since the Court of Appeals affirmed the Appellate Division without opinion, it is the holding in the Appellate Division (273 App. Div. 797) that concerns and we find the Court there stating:

> "In this action to compel the defendant union, *inter alia*, to accept plaintiffs as members or for an injunction to restrain the enforcement of a

closed shop agreement, order granting defendants' motions to dismiss the complaint on the ground that it fails to state facts sufficient to constitute a cause of action, reversed on the law, with $10 costs and disbursements, and the motions denied, with $10 costs, with leave to defendants to answer within ten days from the entry of the order hereon. In our opinion, the complaint contains sufficient allegations to the effect that the defendant union was designated or selected as the exclusive representative of all the employees of the employer, including the plaintiffs, for the purpose of collective bargaining (Labor Law, §705, subd. 1) in entering into a closed shop agreement with the employer."

The above constitutes all of the Court's opinion. We fail to see how counsel for petitioners can adduce all that they write of *Clark* v. *Curtis, supra,* from these cryptic lines.

III.

To state that the petitioners have no remedy under the National Labor Relations Act, as amended, is to draw a curtain on record facts. For the National Labor Relations Board in a series of cases consolidated and tried together (News Syndicate Co., Inc. and Milton Ashkenasy, Case #2-CA-995; News Syndicate Co., Inc. and Edward Canner *et al.*, Case #2-CA-1132; Newspaper and Mail Deliverers' Union of New York and Vicinity and Milton Ashkenasy, Case #2-CB-330; Newspaper and Mail Deliverers' Union of New York and Vicinity and Edward Canner *et al.*, Case #2-CB-373) has found the respondents herein to have violated Sections 8(a)(3) and 8(b)(2) of the

Act with respect to a number of non-union employees of the corporate respondent, including some of the petitioners, and has issued a sweeping order of non-discrimination, reinstatement and back pay.

The Court of Appeals in restricting the petitioners to process before the National Labor Relations Board was cognizant of the fact that the rights of which petitioners claimed to have been deprived were rights created by the Act and that the Act offered not only an ample forum but also the sole forum for the righting of the wrongs alleged on the part of the respondents.

See Sections 8(a)(3) and 8(b)(2), Labor Management Relations Act, 1947 (61 Stat. 136).

Matter of Benedict, 265 App. Div. 518;
Amalgamated Utility Workers v. *Consolidated Edison Co. of N. Y.*, 309 U. S. 261;
Bethlehem Steel Co. v. *N. Y. State Labor Relations Board*, 330 U. S. 767;
Plankington Packing Company v. *Wisconsin Employment Relations Board*, 338 U. S. 953.

POINT II.

No federal question is posed by the Union's membership policy.

Undoubtedly, prior to the amendment of the National Labor Relations Act in 1947, the problem posed by a closed shop contract with an employer coupled with a restrictive membership policy on the part of the bargaining union was one to cause grave concern.

The Labor Management Relations Act, 1947, representing a full scale overhauling of national labor policy, reaffirmed the right of unions to regulate admission of membership; indeed, as the debates on the measure show, Congress anticipated the continuance of restrictive membership policies of one kind or another.

> 2 *Legislative History of the Labor Management Relations Act*, 1947, p. 1096, pp. 1141-1142.

Such restrictive policies were not to be affected since under the Act they could not affect the right of non-members to work, that being protected by Sections 8(a)(3) and 8(b)(2) of the Act.

Petitioners' argument against restrictive membership policies in unions generally is one for the ears of the Legislature and not for the consideration of the Courts.

CONCLUSION.

For all of the foregoing reasons the petition herein should be denied.

Respectfully submitted,

SAMUEL DUKER,
Attorney for Respondent Union.

NOV 26 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 386

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. MCGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Petitioners,

—against—

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Respondents.

BRIEF OF RESPONDENT NEWS SYNDICATE CO. INC.

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IN THE

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No. 386

THOMAS RYAN, LOUIS AIGES, LEON ALTHEIM, HYMAN BASSIN, DAVID BERGER, JOSEPH W. BIANCA, EDWARD F. BRENNAN, SALVATORE CIRIGLIANO, CARMELO COSCIA, ABE FRIEDMAN, EMANUEL GOLDBERG, LOUIS S. GOLDKRANZ, ABRAHAM I. GORDON, ANTHONY GUERRIERO, JOSEPH HAUGH, WALTER HELLER, LOUIS HOCHBERG, JOHN T. HOLCOMB, JOHN JONES, PETER A. KELLY, DANIEL KENNY, WILLIAM KLEINMAN, NEIL KNOWLES, JOHN R. McGUINESS, LOUIS H. MEYERS, FRANK PARELLA, ROCCO PARELLA, ALFRED PETRASSI, BENJAMIN RICOTTA, HARVEY ROSE, AARON SACKS, HENRY SADOWITZ, MICHAEL SCUDERO, JACK SENDER, IRWIN L. SIEGEL, JOHN W. SMITH, NICHOLAS STASI, ARTHUR STERNBERG, DAVID STUPNICK, MANNY HIRSCHBEIN, ANTHONY F. CHICCOLI, BENJAMIN GORDON, DONALD MALLOZZI, JACK MILLER and CARL J. ERICSSON,

Petitioners,

—against—

JOSEPH SIMONS, as President of NEWSPAPER AND MAIL DELIVERERS' UNION OF NEW YORK AND VICINITY, an unincorporated association consisting of more than seven members, and NEWS SYNDICATE CO., INC.,

Respondents.

BRIEF OF RESPONDENT NEWS SYNDICATE CO. INC.

Petitioners seek a writ of certiorari under sections 1257 and 2101, U. S. Code, title 28, to review a judgment of the Supreme Court of the State of New York, County of Queens, entered upon the remittitur of the New York Court of Appeals.

The parties to this dispute may be identified as follows:

Respondent News Syndicate Co. Inc. (herein "the News") is the publisher of the newspapers "Daily News" and "Sunday News" which are printed at plants located in New York City and distributed throughout that city and elsewhere. On the record in this case it is concededly engaged in interstate commerce and subject to the jurisdiction of the National Labor Relations Board (Pet., p. 54).

Respondent Newspaper and Mail Deliverers' Union (herein "the Union"), an unaffiliated labor organization, has for many years had a collective bargaining agreement with the principal newspapers of New York City, including the News, by which it is recognized as the exclusive bargaining agent for employees in the delivery departments of those newspapers.

Petitioners have from time to time worked in the delivery department of the News and other newspapers as "regular substitutes" or "extras", on those occasions when the normal work force of "regular situation-holders" had to be augmented (Pet., p. 43).

Petitioners are not members of the Union and claim to have been denied such membership. The theory of their action is that the Union has prevented them from securing employment at the News and has thereby violated a common law duty which the Union owes petitioners as their agent.

The Opinions Below.

The state courts have declined to accept jurisdiction of the dispute, holding that petitioners are required to avail themselves of their remedy before the National Labor Relations Board.

The trial Court had reached a contrary conclusion, believing itself required by the decision of the New York courts in *Clark* v. *Curtis*[1] to hold that a common law cause of action under principles of agency law co-exists with the administrative remedy provided by federal statute (Pet., p. 46). It accordingly ordered the Union to admit petitioners to membership (*id.*, p. 48).

On appeal to the Appellate Division, Second Department, the judgment against respondents was reversed, the Court observing:

> "In our opinion, the controversy involves unfair labor practices within the purview of the Labor Management Relations Act, 1947 (U. S. Code, tit. 29 § 158, subd. [a], par. [3]; subd. [b], par. [2]) and exclusive jurisdiction thereof is vested in the National Labor Relations Board. (*Cf. Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183; *California Assn.* v. *Building & Constr. Trades Council*, 178 F. 2d 175; U. S. Code, tit. 29, § 160, subd. [a].)"

Clark v. *Curtis* had been decided by the same Court three years earlier, but the Court had no difficulty in

[1] 273 App. Div. 797 (2d Dep't 1947), *aff'd without opinion* 297 N. Y. 1014 (1948).

distinguishing that case, although it did not directly overrule it.[2]

On appeal by petitioners to the New York Court of Appeals, the judgment dismissing their complaint was unanimously affirmed without opinion. However, in a companion action, *Costaro* v. *Simons*,[3] argued and decided simultaneously with this case, the Court wrote a *per curiam* opinion which is equally applicable to this case. The Court said in part:

> "We read the complaint as alleging that the controversy involves unfair labor practices within the purview of the Labor Management Relations Act of 1947 * * *. That being so, plaintiffs are under the necessity of resorting in the first instance to the National Labor Relations Board * * *."

The Court later amended its remittitur in this case to confirm that it had decided this case upon the same ground (Pet., p. 54).

In the Court of Appeals, as in this Court, petitioners urged that *Clark* v. *Curtis* established a vested common law right of action in non-union employees for breach of a union's duty as bargaining agent. It is difficult to say what the rule of that case was, for no opinion was ever written in the case. It seems idle to speculate as to its holding (*cf.* Pet., pp. 2, 13),

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[2] The Court distinguished *Clark* v. *Curtis* on four principal grounds: (1) it was decided upon a motion addressed to the pleadings and not after a trial of the issues; (2) it was commenced prior to the passage of the Taft-Hartley Act; (3) it did not involve an employer shown to be engaged in interstate commerce; (4) no question was raised in that case as to the exclusive jurisdiction of the National Labor Relations Board.

[3] 302 N. Y. 318 (1951).

as we have the word of the Court which decided it that the case was never intended to apply to an employer subject to the jurisdiction of the National Labor Relations Board (*supra*, note 2).

The Basic Issue.

The questions framed by the petition (pp. 2-3) have no more than a remote resemblance to the issue decided in the state courts.

The Court of Appeals did not decide whether the Union was faithless to these petitioners, or whether they had been divested of a pre-existing common law right of action against the Union by the Taft-Hartley Act. The issue posed to and decided by the Court of Appeals was this:

> Does a state court have jurisdiction of a common law action, independent of any statute, against a union and an employer subject to the jurisdiction of the National Labor Relations Board, arising out of a claim of discrimination in employment opportunities against non-union men?

In giving a negative answer to this question, the Court of Appeals held that if it appeared from the pleadings that the controversy involved unfair labor practices within the purview of the National Labor Relations Act, as amended, the state courts were without jurisdiction of the action, and the plaintiffs were compelled to resort in the first instance to the federal administrative processes available for the redress of their grievances.

Summary of Argument.

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I.

Any question of the exercise of state power over any aspect of the employer-employee relationship must be carefully scrutinized in the light of the declared Congressional purpose "to define and proscribe practices on the part of labor and management which affect commerce".[4]

Among the practices proscribed by the federal law is "discrimination [by an employer] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization". This language appeared in the original Wagner Act and was not changed by the Taft-Hartley Act, although the latter added section 8(b)(2) to the original Act, making it an unfair labor act for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)."

While there may be "troublesome problems of supremacy and accommodation between state and federal laws",[5] the conclusion is inescapable that the federal code of regulations governing labor relations will not permit of state action, whether through the executive, legislative or judicial branch, so far as claims of discrimination against non-union employees are concerned.

This case, as the state courts accurately observed (Pet., pp. 52, 54), turns upon the "basic grievance" that petitioners have been the victims of discrimination, actual or threatened, in favor of union mem-

[4] §1(b) of the Labor Management Relations Act, 1947 (sometimes referred to herein as "the Taft-Hartley Act").

[5] Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950).

bers. The obvious purpose of the action is to enlist the aid of a state equity court to suppress such discrimination. It cannot be concealed behind a camouflage of allegations, derived from the common law of agency, that a faithless agent has violated a duty owed to its principal. Such common law principles are of little or no value in settling complex problems of labor-management relations, and it would be the height of folly to permit their application where adequate remedial processes are available under federal law.

The Court of Appeals in this case has not abdicated the entire field of labor relations to the federal government under the compulsion of the Taft-Hartley Act, as petitioners suggest (p. 17). Nor is there any warrant in the decisions below for the argument that state courts will be powerless to redress common law torts arising out of labor disputes unless this decision is reversed. No one could seriously question, for example, the continued authority of state civil and criminal courts to punish assaults upon union representatives engaged in lawful organizational work. Such auxiliary matters as the protection of person and property remain with the states.[6]

This case presents an entirely different problem, one which lies outside the proper orbit of state action: the right of non-union employees to be free from discrimination in employment exerted against them solely because of their status. If the Court of Appeals had upheld the position of the trial Court that federal jurisdiction was not exclusive, but was concurrent with state jurisdiction to attack the problem by the application of principles of agency law, the result

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[6] See Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 MICH. L. REV. 593, 602 (1948).

would frustrate the effectiveness of a single national policy in this field.

Aside from the fact that the Court of Appeals was required by numerous decisions of this Court to yield to federal power (*infra*, p. 10), the practical wisdom of such a conclusion is beyond dispute. Problems of discrimination against non-union employees in interstate industries are complex enough without superimposing control by state courts and regulatory bodies, each with its own special notion of the proper solution.

Congress has invested the National Labor Relations Board with ample powers to investigate and remedy such claims of discrimination. While petitioners depreciate the Board's processes as a "limited remedy" (Pet., p. 17), the fact is that the Board has been extremely active in prosecuting unfair labor practice charges against this Union arising out of hiring practices at the New York City newspapers, including the News.[7]

Here, then, is no case of potential conflict, but of direct, actual conflict; while petitioners were pressing their claim in the state courts, the national board was directly attacking the same problem through its own processes and in the district court.

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[7] In *Matter of News Syndicate Co. Inc. and Milton Ashkenasy*, 95 N. L. R. B. No. 143 (1951), the Board found that this Union had caused discrimination in the employment of workers in respondent's delivery department. Both respondents were directed to reimburse complainants (some of whom are petitioners here) for any pay lost by reason of discrimination. Moreover, the Union was directed to desist from causing this respondent to discriminate against employees or applicants for employment, and to notify this respondent that it had no objection to the hiring of persons without regard to their membership in the union. See also *Jaffee* v. *Newspaper and Mail Deliverers' Union*, 97 F. Supp. 443 (S. D. N. Y. 1951), where an injunction was issued against the Union at the request of the Board's regional director under section 10(j) of the Act on similar facts.

The Decisions of this Court.

The trend of this Court's opinions over the past five years in cases involving actual or potential conflict in state and federal jurisdiction over labor relations makes it plain that state power is ousted from any particular area in which federal regulations have been made directly applicable.

Bethlehem Steel Co. v. *New York State Labor Relations Board*[8] was the first of this series of cases to limit the jurisdiction of the state over a branch of labor relations. It involved a representation proceeding in which the state board had certified a bargaining representative for supervisory employees at a time when the national board had a policy against such certification. Noting that federal jurisdiction had been asserted over the employer on other matters involving labor relations, this Court held that the federal power was exclusive on a certification question and that the state instrumentality was not free to act, even in advance of federal action.

Some state courts interpreted the *Bethlehem* decision as holding that "wherever the employer-employee relationship is one over which Congress has the power of regulation and with regard to which Congress has acted, state power is suspended and cannot constitutionally be exercised."[9] The Court's decision in *La Crosse Tel. Corp.* v. *Wisconsin Employment Relations Board*,[10] was in accord with that view. There the Court held that the state board did not

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[8] 330 U. S. 767 (1947).

[9] See *Pittsburgh Ry. Substation Operators Case*, 357 Pa. 379, 386 (1947); see also Cox and Seidman, *supra*, n. 5, at p. 214.

[10] 336 U. S. 18 (1949).

have jurisdiction in a representation proceeding involving the designation of an appropriate bargaining unit for a small employer probably under the jurisdiction of the national board. Explaining that its decision in the *Bethlehem Steel* case was because the situation was "too fraught with potential conflict to permit intrusion of the state agency", the Court went further and denied jurisdiction to the state agency even though the national board had not acted —indeed, for all that appeared, if it had acted it would have reached the same conclusion as the state board.

In *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*,[11] the Court permitted state enforcement of a law making it an unfair labor practice to enter into a union security agreement without the approval of two-thirds of the employees affected. This was followed a year later by the *Plankinton Packing Co.* case,[12] where the state board had found the company and the union guilty of unfair labor practices under state law for discharge of an employee on demand of the union, although he was not required to be a union member. While only a *per curiam* opinion was written in the *Plankinton* case, it has been regarded as the culmination of a line of decisions which have had the effect of excluding "state regulation of any field of activity which Congress has shown its intention to regulate, unless there is an affirmative showing that the way was kept open for state regulation".[13]

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[11] 336 U. S. 301 (1949).

[12] *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U. S. 953 (1950).

[13] Cox and Seidman, cited *supra*, n. 5, at p. 224.

Finally, the Court's decision at the last term in the *Amalgamated Association* case[14] is a clear holding that state regulation may no longer be brought to bear upon rights guaranteed by Congress in §7 of the Act. And one of those rights, as the Court observed, is the right to refrain from joining a labor union or from engaging in concerted activities.[15]

It is submitted that the Court of Appeals reached the only decision possible under those cases. Had the objectives of the common law action been consistent with the federal objectives as determined by the national board, the solution might have been more difficult. But the two sets of objectives were quite diverse, and the state courts were being asked to intervene in a case which the National Labor Relations Board was not only capable and willing to handle, but had already taken in hand.

Congress has proscribed discriminations in hiring intended to encourage or discourage union membership. The national board is the agency charged by Congress with responsibility for developing and implementing policies and procedures for dealing with problems of discrimination on a national basis. It is submitted that state agencies, whether executive or judicial, may not be allowed to enter this field and act concurrently with the national board.

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[14] *Amalgamated Assn. of Street, etc., Employees* v. *Wisconsin Employment Rel. Bd.*, 340 U. S. 383 (1951).

[15] *Id.* at note 12.

II.

The relationship of agent and principal between a group of employees and their bargaining representative has its source in the National Labor Relations Act. While in some cases the relationship may derive from the consent of both principal and agent, here the agency is an involuntary one, for the Union was compelled by §9(a) of the Act to assume the duties of exclusive collective bargaining representative of all employees in the unit, whether or not members of the Union.

When the relationship is thus viewed as involuntary and purely statutory in origin, the anomaly of suing in a common law action for breach of that relationship becomes obvious. The statute created the relationship and provides the sole remedy for its breach, and the familiar principle may be invoked that where a statute provides a right and a remedy the statutory remedy is exclusive.[16]

Furthermore, the maintenance of this action in the state courts in the first instance collides with the established principle that no one is entitled to judicial relief until the prescribed administrative remedy is exhausted.

In *Myers* v. *Bethlehem Shipbuilding Corp.*[17] an employer contended that since interstate or foreign commerce was not involved and since a hearing before

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[16] See, *e. g.*, *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301 (1943).

[17] 303 U. S. 41 (1938).

the National Labor Relations Board would subject the employer to irreparable damage, rights guaranteed by the Constitution would be denied unless it were held that the District Court had jurisdiction to enjoin the National Board from conducting a hearing. In rejecting this argument, the Court made the following significant comment (p. 50):

> "So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

The force of this rule is especially compelling in this case, for "Congress has worked out elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience, and has provided for the handling of unfair labor practices by an administrative agency equipped for the task."[18]

III.

Petitioners' grievances fall within an area "within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law

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[18] Parker, *C. J.* in *Amazon Cotton Mill Co.* v. *Textile Workers*, 167 F. 2d 183, 187 (C. C. A. 4th 1948).

having its source in those statutes, rather than by local law."[19]

Petitioners would have no rights here in the absence of federal statutes dealing with labor-management relations. To the extent that those statutes create those rights, the remedy for an infringement of those rights must be found within the framework of those federal statutes. Such remedy is entirely adequate, and the Court of Appeals properly held it to be exclusive in the first instance.

The decision of the Court of Appeals on the federal question presented to it is in accord with the applicable decisions of this Court. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

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[19] *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).